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IN THE

Supreme Court of the United States

OCTOBER TERM [redacted] 1969

MARVIN C. MESCH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Attorney for Petitioner

No. _____

IN THE
SUPREME COURT
OF THE
UNITED STATES
October Term, 1968

MARVIN C. MESCH,)
)
Petitioner,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Respondent.)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Marvin C. Mesch, your Petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case, on March 8, 1969, affirming the United States District Court for the District of Colorado, wherein Petitioner was denied relief upon his petition under Section 1631 of U.S.C.A. A Petition for a Rehearing was denied on April 11, 1969.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit entered on March 8, 1969, (Appendix A, infra) has not yet been officially reported.

In denying Petitioner's motion under Section 1631, the United States District Court for the District of Colorado rendered its opinion, as yet unreported, on June 11, 1968, (Appendix B, infra)

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. # 1254(1).

QUESTION PRESENTED

Whether a defendant in a criminal case is denied effective assistance of counsel as provided by the 6th amendment to the United States Constitution of America because he was represented at this trial by one attorney paid for by one of the multiple defendants, where all defendants had diverse and inconsistent legal status, diverse and inconsistent defenses, and a conflict of interest was known to the parties and by their attorney.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment to the Constitution of the United States:

In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature of and cause of the accusation and to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the effective assistance of counsel for his defense.

28 U.S.C. Section 2255: (Appendix C, infra)

CONCISE STATEMENT OF CASE

Defendant, together with others (11 in all), allegedly in violation of 18 U.S.C. # 1341, were indicted for mail fraud. The Indictment charged the Defendants, including Petitioner, ". . . devised and intended to devise a scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises from numerous persons . . . being that class of persons engaged in excavating, concrete, plumbing and other types of construction work, who could be induced to execute and enter into Dealership Agreements . . ." involving the sale and installation of swimming pools.

The Indictment charged that the Defendants would and did make and cause to be made "orally to said persons intended to be defrauded" certain alleged false and fraudulent pretenses, representations and promises, specifically set forth in the Indictment.

Charged for this offense were eleven separate Defendants. All defendants were convicted on all counts of the Indictment. Subsequently, one defendant, Robert Roller, was granted a new trial after retaining separate counsel and offering proof to the court that certain evidence beneficial to said defendant Roller had not been used at the original trial of all defendants.

Appeals were taken by four defendants, all of which are now before this Court on Petition for Writ of Certiorari (Howard H. Baldwin and Clair C. Wagner v. United States of America; Donald J. Anderson and Marvin C. Mesch v. United States of America; October term, 1968).

On April 2, 1968, Petitioner filed a Motion to Vacate and set aside Judgment and Sentence in the United States District Court for the District of Colorado, case # C-803. An evidentiary hearing was held on May 25, 1968. A decision was rendered on June 11, 1968 denying the Motion. An appeal was docketed and arguments heard on November 19, 1968. A decision was rendered on March 8, 1969 and rehearing was denied April 11, 1969.

All defendants were tried together with the exception that defendant Raymond C. Cross retained prior to trial a separate attorney and, upon request, was granted a separate trial from the remaining defendants, all of whom were represented by one attorney retained by defendant Wagner. All defendants, both corporations and individuals, were convicted on all counts presented to the jury for its consideration after brief deliberation.

REASONS FOR GRANTING THE WRIT

The question presented in this case is one of first impression in this Court. There are conflicting opinions in the U.S. Court of Appeals in the 2nd Circuit, Campbell v. U.S., 352 F.2d 359 (2nd Cir. 1965) and Lollar v. U.S., 376 F. 2d 243 (2nd Cir. 1967) and the 10th Circuit, Fryer v. U.S., (10th Cir. 1968 #10120) and Mesch v. U.S., (10th Cir. 1969 # 10193). Inasmuch as counsel for the accused is often subjected to the necessity of representing, or at least being requested to represent, multiple defendants, and inasmuch as most defendants have little or no education or sophistocation in legal matters, and inasmuch as there are many instances where conflicts of interest, known and unknown, exist, or become known to counsel and defendants after, during or prior to the actual trial, it is, in counsel's view, incumbent upon this Honorable Court to establish guidelines, or supervisory rules, for attorneys and courts to follow which will properly and fairly protect the rights of defendants to the "effective assistance of counsel" as guaranteed by our Constitution.

Inconsistent defenses, legal status, and strategy are the rule rather than the exception where multiple defendants are trial-represented by one attorney. However, retained counsel, where paid by one of multiple defendants, must of necessity owe more duty to his employer than he does to other defendants who have chosen, for whatever reason, to "sink or swim" with the paying client. Normally financial pressures will induce an otherwise reluctant defendant to place his

fate in the hands of counsel where another is paying the fee. This practice, often eliminated by indigency and court-appointed counsel, still is to be abhorred in our system of jurisprudence for it treats defendants on an unequal basis, thereby creating the very real possibility, even the very real probability, of denying equal protection of the laws to all accused persons. In the Fryer case the court alludes to the fact that "cautious practice would frequently indicate the appointment of separate counsel in indigent cases". I submit that an educated or affluent person uneducated in the machinery of the law, unfamiliar with the risks of having one attorney represent various interests, is entitled to the same jealous safeguards of the constitution as an indigent or uneducated individual.

The Lollar case, as well as others cited herein, set forth the procedure for courts to follow in assuring that a defendant has intelligently chosen to have one attorney represent multiple defendants. Naturally, our system cannot guarantee that conflicts might not exist if such procedure is followed, but at least the simple fact that the court has advised the defendant of his right to defense counsel separate from his co-defendants and has determined that the defendant has intelligently chosen, at least so far as is humanly possible to determine in such a situation, the counsel, then the constitutional precaution is met.

We submit that until the Escobedo case, and later cases on the same subject of individual rights, it was not considered workable or feasible to formally advise the defendant of any rights. We have learned to live with that far-reaching de-

cision, and we will learn to live with a decision of this court establishing the supervisory rule requested, and now being followed by many of our courts. Kaplan v. U.S., 375 F.2d 895 (C.A. Cal. 1967, 9th Cir) follows the guidelines established by Glasser v. U.S., 315 U.S. 60, and followed by the 2nd Circuit cases.

CONCLUSION

Petitioner respectfully submits that he was denied the effective assistance of counsel as guaranteed by the 6th amendment to the United States Constitution. Petitioner submits that a double standard has been established by our courts for indigent defendants as compared to others. Petitioner submits that no universal guidelines have ever been established by this court to guide defendants and their attorneys in situations such as presented in this case. Petitioner submits that the extension of the present rules for advising defendants to include multiple defendants when jointly indicted, arraigned, and tried, is a logical, necessary, and contemplated right of defendants accused of offenses violative of the law.

Respectfully submitted,

JACK I. SCHEIMAN
Attorney for Petitioner
666 Sherman Street
Denver, Colorado 80203

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
January Term, 1969

MARVIN C. MESCH,)
)
Appellant,)
)
vs.) No. 10193
)
UNITED STATES OF AMERICA,)
)
Appellee.)

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF COLORADO

Jack I. Scheiman for Appellant.

Robert E. Long, Assistant United States Attorney, (Lawrence M. Henry, United States Attorney, was with him on the brief) for Appellee.

Before LEWIS, HILL and SETH, Circuit Judges.

PER CURIAM.

Appellant was convicted of using the mails to defraud, substantive violations of 18 U.S.C.

§ 1341, and the convictions have this day been affirmed on appeal to this court. Mesch v. United States, ___ F.2d ___, No. 10051. Subsequent to conviction and during the pendency of the direct appeals, appellant filed a motion under 28 U.S.C. § 2255 to vacate his sentences and judgments alleging that he had not received the effective assistance of counsel at trial. By direction of this court, an evidentiary hearing on this supplementary claim was held by the trial court. Relief was denied, this appeal followed and was submitted to us along with the main appeals.

Appellant's single contention in the instant case is premised on the fact that his trial counsel also represented several of the codefendants, one of whom, Wagner, paid counsel for jointly serving them. Argumentative emphasis is also placed on the procedural fact that the trial court made no pretrial inquiry as to the possibility of a conflict of interest arising from joint representation or advise appellant of his right to separate counsel.

Appellant points to no trial incident and our review of the trial record reveals nothing from which it can be inferred that any semblance of prejudice resulted from joint representation. Appellant testified extensively in his own behalf; no conspiracy was charged among the defendants that might suggest the desirability of a trial tactic of dissociation among defendants; and trial counsel is even now recognized by appellant as a "trial advocate of the highest caliber." We have had recent occasion to consider the principal authorities cited by appellant relating to the impact

of the sixth amendment on joint representation of codefendants and thus have no need to again set out our views. See Fryar v. United States, No. 10120, dec. December 26, 1968.

AFFIRMED.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action C-803

MARVIN C. MESCH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	ORDER
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

Petitioner and his codefendants were convicted on various counts of mail fraud in violation of 18 U.S.C. § 1341. He has filed a notice of appeal and by his present motion seeks to have the judgment and conviction vacated and a new trial granted. On May 27, 1968 the Court of Appeals remanded the cause to this Court so that we may consider petitioner's motion and certify to the appellate court whether the motion will be granted or denied.

At trial petitioner and his codefendants were represented by one retained counsel. Petitioner contends that he was denied the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution. He asserts that a conflict exists between him and his codefendant Wagner; that Wagner is indebted to petitioner in a substantial sum which Wagner in-

duced him to invest in the business ventures which he controlled. He further contends that this conflict existed because of the manner in which Wagner handled the business transactions of the various corporations employing petitioner. Petitioner further asserts that he was unaware of the potential conflicts which can arise when multiple defendants are represented by one attorney and further that it was an impossible task for a single attorney to represent petitioner and the other defendants.

Neither in the pleadings, through evidence offered at the hearing, nor in oral argument, has petitioner pointed out or otherwise demonstrated a single factual situation which occurred prior to or during trial that would support a claim of conflict of interest. He makes no definite assertion of prejudice that resulted from the joint representation. He seems to rely solely on a claimed presumption of a Sixth Amendment violation because of representation of multiple defendants by one attorney, citing Glasser v. United States, 315 U.S. 60 (1942); Campbell v. United States, 352 F.2d 359 (D.C. Cir. 1965); Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967).

We note from the record in this case that petitioner is a sophisticated businessman fully conversant with the swimming pool business, which was the primary activity that all of the defendants were engaged in, and out of which the criminal action arose. This is confirmed by the following excerpt from petitioner's affidavit filed in this Court on February 12, 1968 in support of the motion for new trial of one of his codefendants.

1. I was a full-time employee of Cinderella Pool Corporation and, later on, Town and Country Pools, Inc., from sometime in the summer of 1963 to 1966. I initially worked in the engineering department of the company and continued in this capacity until March or April, 1964, when I was put in charge of sales activity.

2. During the period of time I was employed by these corporations, my duties called for me to spend my time in the company offices. These offices were located at 320 South Colorado Boulevard when I first went to work for the corporations but they were moved to 470 South Colorado Boulevard, Denver, Colorado, shortly after I went to work and thereafter I worked in the office at 470 South Colorado Boulevard.

3. I was hired by these corporations because I was and am qualified in the engineering and sales phases of the distribution business and, in particular the swimming pool business. I was familiar with the manner in which prospective dealers were interviewed for dealerships.

Further, the defendant's personal involvement in the operation of the business of the respective corporations is fully and clearly shown in the transcript of his trial testimony, 48 pages of which comprise his direct testimony and an additional 36 pages of testimony on cross-examination.

We think that Glasser, supra, is inapposite. There the defendants were charged with conspiracy. Glasser objected to the appointment of one of his attorneys (Stewart) to represent a codefendant (Kretske). Nevertheless the trial court did appoint Stewart to represent the codefendant. Glasser contended that certain testimony, inadmissible as to him, was allowed without objection by Stewart on Glasser's behalf because of Stewart's desire to avoid prejudice to Kretske. At p. 76 of the Glasser opinion the court says

> ...In conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant, it is especially important that he be given the benefit of the undivided assistance of his counsel.... Here the court was advised of the possibility that conflicting interests might arise which would diminish Stewart's usefulness to Glasser.

We read Glasser to require a showing of prejudice or conflict of interest by a party claiming deprivation of Sixth Amendment rights.

The Campbell, supra, and Lollar, supra, cases were both decided by the Court of Appeals of the District of Columbia. Although these two cases seem to give some support to petitioner's position, we believe they are factually distinguishable.

In Campbell, supra, the court states

> The case against Campbell was stronger

than the case against Glenmore. The arresting officer testified that he saw Campbell make a flipping motion; and a watch which was found close to his feet was identified as a part of the stolen property. He had a sum of money in his pocket, the bills being in the same denominations and folded in the same way as the bills stolen from the complaining witness. On the other hand, there were few things connecting Glenmore with the crime: he was with Campbell a few minutes after the crime; Campbell testified without contradiction that Glenmore had been with him all evening....

* * * *

Defense counsel stated that he had virtually ignored Glenmore and "unwittingly * * * made all comments with reference to the Defendant Campbell." In his argument to the jury, defense counsel did not once mention the special problems presented by the case against Glenmore. And it was the judge, not defense counsel, who, after all the evidence was in, raised the issue of the insufficiency of the evidence as to Glenmore. Furthermore, defense counsel made no effort to dissociate Glenmore from Campbell, against whom the Government presented a stronger case. We need not decide whether some of these omissions were due to oversight; the fact that one attorney was representing both defendants certainly rendered his service to Glenmore much less effective.

It should also be noted that in that case Glenmore did not take the stand.

In Lollar, supra, defense counsel twice confused Lollar with his codefendant Ford. He allowed Lollar to take the witness stand in spite of his criminal record which was elicited by the prosecution for impeachment purposes.

In the criminal action which petitioner attacks each of the defendants testified in his own behalf; and as previously noted, petitioner testified at considerable length. Although the evidence disclosed that the respective defendants played different parts in conducting the business, their testimony was strikingly consistent. Not a single incident occurred at trial to suggest that even a minor conflict of interest existed between Mesch and his codefendant Wagner or between Mesch and any of the other defendants. Certainly, the fact that all defendants were convicted does not show a conflict of interest or demonstrate the ineffective assistance of counsel.

If, as counsel for petitioner contends, Lollar, supra, holds 'that where multiple defendants are represented by one counsel, in order for a conviction to stand against a claim of violation of the Sixth Amendment right to the effective assistance of counsel, the record must convince beyond a reasonable doubt that the complaining defendant was not prejudiced because of the joint representation', we choose not to follow that conclusion. We believe the better rule to be that a conflict of interest must be shown as the foundation for any claim that a joint representation of defendants by the same counsel was a deprivation of the right to the effective assistance of counsel as that rule appears to have been laid down in United States v. Paz-Sierra, 367 F.2d

930 (2nd Cir. 1966); see also United States v. Burkeen, 355 F.2d 241 (6th Cir. 1966); United States v. Cosentino, 372 F.2d 61 (7th Cir. 1967).

We find that petitioner was ably represented at trial by counsel of his own choosing; that no conflict of interest relating to any facts or circumstances concerning the criminal action existed between petitioner and codefendant Wagner, nor between petitioner and any other of his codefendants; and that no prejudice resulted against petitioner by reason of his joint representation by a single counsel. It is therefore

ORDERED that petitioner's motion to vacate and set aside his conviction in Criminal Action 66-CR-243 and grant him a new trial be, and the same hereby is, denied. It is further

ORDERED that the Clerk shall forthwith deliver a certified copy of this Order to the Court of Appeals of the Tenth Circuit.

DATED at Denver, Colorado, this 11th day June, A.D. 1968.

BY THE COURT:

/s/ Alfred A. Arraj
ALFRED A. ARRAJ,
Chief Judge
United States District
Court.

APPENDIX C

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105.